No. 3983

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPOKANE & EASTERN TRUST COMPANY
(a corporation),
Appellant,

vs.

UNITED STATES STEEL PRODUCTS COMPANY
(a corporation),
Appellee.

APPELLEE'S REPLY TO APPELLANT'S PETITION FOR A REHEARING.

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Appellee, the Steel Company, after leave of Court first had and obtained, answers appellant's petition for rehearing and prays that the same be denied on the following grounds:

First. That the issues raised in said petition were fully considered and expressly decided by the Trial Court.

Second. That the questions raised by said petition were fully briefed, argued and submitted to this Court and were, moreover, expressly and specifically considered and decided in the opinion filed.

Third. That appellant received the fund in suit with full notice and knowledge of appellee's rights and title, and was, therefore, without right or authority to apply said fund to any use except the payment thereof to appellee.

Fourth. Appellant's claim is wholly without equity and constitutes an attempt to charge the payment of the drafts, mentioned in said petition, to appellee's fund instead of to remittances which it received for the express purpose of paying said drafts.

Argument in Support of Answer.

In the first place, attention is called to the decision of the Trial Court (Tr. 19) wherein it is said:

> "The funds thus transmitted to the Spokane and Eastern Trust Company by the Central Bank and Trust Company were so transmitted for the special purpose of providing the Spokane and Eastern Trust Company with funds with which to pay the draft and for no other purpose, *all of which was well known to the Spokane and Eastern Trust Company when such funds were received.*" (Italics ours.)

The Trial Court further finds that the proof fully sustains this allegation. (Tr. 20.)

The matters presented by appellant's petition were, moreover, reargued before the Trial Court between the time of filing the memorandum of decision and entry of the decree.

The point urged in the petition was also expressly decided in the opinion of this Court wherein it is said:

> "that those officials (of appellant) knew of the collection of the check, here involved, from the time it was in the hands of the Central Bank until the draft was dishonored by the Spokane Bank".

In the petition appellant expressly admits that if it had notice or knowledge of appellee's rights at the time it received the fund, the petition is without merit. It, therefore, follows that when both Courts expressly decided that appellant did have notice of appellee's rights at the time it received the fund, the only question to be determined is whether or not the evidence supports such a finding.

The proofs on this issue are not in the least complicated or difficult to understand and appreciate. They were, furthermore, fully reviewed and discussed in the briefs. It is, therefore, difficult to believe that both Courts could have fallen into error. The evidence supporting this issue is reviewed in sec. 14, pp. 62-67, appellee's brief, and shows appellant's knowledge from the beginning, through three of its agents and officials, first Buchholtz, its agent in full charge at Yakima (appellee's brief, sec. 12, pp. 40-54); second, Triplett, its vice-president, in charge of country banks at Spokane, through telephone and letters from Buchholtz, and third, Rutter, its president, through letter from Buchholtz.

Appellant's petition merely questions the knowledge of Triplett, overlooking the knowledge of Buchholtz. The knowledge of Triplett from the outset is, however, clearly established, twelve minutes on the telephone the day the remittance came in and another conversation the day appellant received the proceeds together with the surrounding circumstances detailed in appellee's brief, sec. 14, pp. 62-67.

The statement in the petition of witness Miner's testimony on cross-examination in nowise weakens or detracts from his testimony given on direct examination, as follows:

> "I asked him whether he had discussed this matter of this cash remittance letter and this draft and he said that he had discussed that matter with them over the long distance 'phone. * * * I brought the point out by a question to Buckholtz if he had informed the Spokane & Eastern Trust Company that the remittance that was made to it on the 21st by the Central Bank were the proceeds of those same collection items. He said he had communicated that information to them by long distance telephone." (Tr. 72, 73.)

The mere fact that Buchholtz did not fix the date of the telephone conversations is of no consequence; that fact is supplied by the telephone tags in evidence, referred to in the briefs and opinion of the Court.

The suggestion in the petition that the language of Buchholtz' letter to Rutter on the subject nega-

tives a prior telephone conversation is wholly without merit. The telephone conversations were with Triplett, and a perusal of the correspondence in the record demonstrates clearly that Buchholtz never at any time treated Triplett as a means of communication between himself and Rutter. For instance, in the above mentioned letter, we find Buchholtz conveying the same information to Rutter which he had previously written Triplett, and in so doing, writing as though he had never communicated such facts before. The whole correspondence shows Buchholtz regarded Triplett as his equal and Rutter as his immediate superior.

On pages 9 and 10 of the petition, appellant does indeed advance a most singular argument to disprove its knowledge of appellee's rights prior to January 25th. The argument is that appellant seized and converted the fund as soon as it learned that it belonged to appellee, and that if it had acquired such knowledge sooner it would have attempted to appropriate more of the fund to the Central Bank's indebtedness. True, enough, appellant admittedly showed absolutely no consideration for appellee's rights and acted in total disregard thereof, but it is difficult to see why a knowledge of appellee's ownership should have caused appellant to vary its conduct, or why it should have been more anxious to appropriate the funds of appellee than if they had actually belonged to the Central Bank. Obviously and admittedly, the fact is that the ownership of the fund and appellant's knowl-

edge thereof in nowise influenced its conduct, except, perhaps, to make it delay its final seizure for the reasons hereinafter stated.

Immediately upon receipt of the fund, appellant undertook to apply between $9000.00 and $10,000.00 to the Central Bank's overdraft (Tr. 111, 232); then on January 24, appellant paid two of the Central Bank's checks (Tr. 140, 141); and, finally, on the 25th appellant attempted to apply the balance of the fund to overdue rediscounts of the Central Bank returning such overdue paper to it (Tr. 22-24.)

If, as is admitted, appellant did not hesitate, with full knowledge, to use appellee's money to pay the Central Bank's indebtedness, why should it hesitate, with like knowledge, to honor the Central Bank's checks? The self-interest of appellant was the same whatever knowledge of the true ownership of the fund it may have had.

Assuming, as is admitted by appellant, that self-interest was appellant's sole actuating motive, two very good reasons appear why with full knowledge of appellee's rights appellant proceeded as it did. In the first place, the amount actually appropriated by appellant was, in all probability, sufficient to satisfy such self-interest, and in the language of Triplett was sufficient to put it in a position where it would not lose anything. (Tr. 226.) As already stated, the overdraft had already been satisfied and

the remaining indebtedness of the Central Bank was secured by collateral and by Bargehoorn's personal endorsement. (Tr. 138.) So far as the record shows appellant could not have used more of the fund than it did use. There is nothing in the record to show that the Central Bank's note secured by collateral was then past due, and, likewise, so far as the record shows, all past due rediscounts were charged back. A rediscount that was not past due could, of course, not be charged back. After making the charge back on the 25th there was still a balance of some two thousand dollars of the fund left. (Tr. 112, 113.) Undoubtedly, if there had been more past due rediscounts they would have been charged back.

Again, if appellant had desired to use more of the fund against the Central Bank's rediscounts it could not have safely done so sooner. The major portion of the fund, $45,000.00, consisting of a draft of the Yakima Valley Bank, drawn on the Bank of California at Tacoma, was not presented and honored until January 24th. (Tr. 36, 45.) If appellant had dishonored the Central Bank's checks prior to that time, such action would undoubtedly have resulted in stopping payment and dishonor of the $45,000.00 draft, and appellant's purposes would thereby have been defeated. It was, therefore, to appellant's self-interest to delay its action even at the expense of paying the Central Bank's checks in the meantime.

Possessed, as appellant was, with full knowledge of appellee's rights, it had absolutely no more right to use appellee's funds to pay the Central Bank's drafts than it had to apply them on the Central Bank's indebtedness. The drafts on their face disclosed that they were issued some time prior to the transaction here involved, and appellant was fully advised of the fact that they were in nowise chargeable to appellee's fund. The drafts of the Central Bank paid by appellant consisted of one for $17,700.00 issued January 18th, and paid January 24th and another for $1438.00 issued January 20th and paid January 24th. As appellant well knew, the Central Bank was without funds, begging to keep the small collections realized on its paper. It also knew that any large deposits which were made of necessity represented collection items, and that as soon as deposits were made drafts were immediately presented against them; in other words, it knew that such deposits were made for the specific purpose of meeting such drafts. (Tr. 140, 141.) Thus, on January 18th, when the Central Bank drew the $17,700 draft it deposited $16,818.00 with appellant to meet it, and in this instance Buchholtz so advised appellant by letter, referring to the deposit and requesting appellant to keep a stiff upper lip when the draft arrived. (Tr. 199.) Instead of holding this deposit to meet the draft, appellant applied the same to its overdraft, and now asks the Court to permit it to charge the draft so

paid to appellee's fund. There is absolutely no more reason for permitting such a thing to be done than there would have been for permitting appellant to keep the entire fund. The result is the same in both cases. Appellant has its claim against the Central Bank to reimburse it for the credit so extended. And as for equity, appellant knew the facts and, with its eyes open, voluntarily extended credit to the Central Bank. Appellee never gave the Central Bank any credit whatsoever, but merely used it as a collection agent. The Central Bank's indebtedness to appellant was not increased one penny as a result of the collection transaction here involved. Its indebtedness remained constant both as to rediscounts and overdraft. (Tr. 85, 87.) The decree, as made and affirmed, leaves appellant's indebtedness against the Central Bank in exactly the same position as if appellee's collection had never come into the hands of the Central Bank or appellant. Evenhanded justice has been done and the petition for rehearing should be denied.

Dated, San Francisco,
August 1, 1923.

Respectfully submitted,
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JOHN H. POWELL,
PETERS & POWELL,
Solicitors for Appellee.